

ORDER ON APPEAL
BY J. MAKOWSKI ASSOCIATES, INC. OF HEARING OFFICERS
DENYING LATE PETITION TO INTERVENE

I. INTRODUCTION

On August 24, 1994, J. Makowski Associates, Inc. ("Makowski") filed an appeal ("Appeal") of a Hearing Officers' Ruling in this docket denying the late petition of Makowski to intervene in this proceeding ("Ruling"). This docket concerns the regional integrated resource plan ("IRP") submitted to the Department of Public Utilities ("Department") by Massachusetts Electric Company and its affiliates within the New England Electric System (collectively "Companies").¹ On June 15, 1994, the Department issued an Order of Notice and directed the Companies to publish the notice no later than June 20, 1994. The Order of Notice stated that any person who wished to intervene as a party or participate as an interested person in the proceeding had to file a written petition to intervene with the Department by July 5, 1994.²

¹ The Companies' IRP was filed with the Department pursuant to the procedures adopted in IRP Procedures, D.P.U. 93-138/157-A (1994).

² In accordance with G.L. c. 12, § 11E, the Office of the Attorney General filed a Notice of Intervention. In addition, pursuant to the IRP Procedures, the Department appointed a Settlement Intervention Staff as a party. Further, the Hearing Officers granted the petitions to intervene of Representative Daniel J. Valianti, Coalition of Non-Utility Generators, Inc., Massachusetts Division of Energy Resources, The Energy Consortium, Conservation Law Foundation, Massachusetts Energy Efficiency Council, Inc., Boston Edison Company, Western Massachusetts Electric Company, Milford Power Limited, and Point of Pines Beach Association.

On August 15, 1994, Makowski filed a petition to intervene late in the this proceeding ("Petition"). The Petition stated that Makowski is the owner and developer of the Cady Brook Corporation Project ("Cady Brook") and that Makowski's interests will be substantially and specifically affected by this proceeding because the outcome may affect the status of Cady Brook as an award group member for the 1992 Contingent RFP (Petition at 1). The Petition also stated that Makowski will be substantially and specifically affected by the outcome of this proceeding because "it may be interested in participating in any resource solicitation that would be held in the course of this proceeding" (id. at 2). Further, Makowski stated that due to its very specific interest in the Cady Brook project, Makowski's interests cannot be represented by any other party in this proceeding (id. at 1-2). In addition, Makowski stated that if granted intervenor status, Makowski would comply with any settlement and adjudicatory schedules that have been set (id. at 2). Finally, Makowski stated that the Companies assented to Makowski's Petition to intervene late (id.). No one filed comments on or objections to Makowski's Petition.

On August 19, 1994 the Hearing Officers issued the Ruling denying the Petition based upon a finding that Makowski failed to (1) file timely under the terms of 220 C.M.R. § 1.03(1)(c), and (2) show good cause, as required by 220 C.M.R. § 1.01(4), for the Hearing

Officers to waive the intervention deadline established in the published Order of Notice (Ruling at 3). Further, the Hearing Officers found that granting the Petition would risk undue delay or disruption in the orderly conduct of the proceeding (id.). In addition, because the Petition was denied on the basis that it was untimely, the Ruling did not address the arguments raised by Makowski relative to how it would be substantially and specifically affected by these proceedings (id. at 4).

II. POSITION OF MAKOWSKI ON APPEAL

In its Appeal, Makowski requests that the Department grant it full intervenor status in all phases of this proceeding (Appeal at 1-2). In the alternative, should the Department not approve a settlement in this proceeding, Makowski requests that the Department grant it full intervenor status for the adjudicatory phase of the proceeding (id. at 2).

In support of its Appeal, Makowski states that the Ruling issued by the Hearing Officers is inappropriate and inconsistent with the Department's discretion to grant or deny petitions to intervene (id.). Specifically, Makowski asserts that the representations it included in its Petition, namely, an agreement to comply with the existing settlement schedule and a statement that the Companies assented to the Petition, has served as a sufficient basis in other Department cases

to allow a late filed petition to intervene (id. at 2-3). Makowski also takes issue with the significance the Ruling attached to the fact that Makowski offered no explanation as to why it filed an untimely petition (id.). Further, Makowski states that it did not include in its Petition an explanation for its late filing because, consistent with Department practice (according to Makowski's view), such explanations have not been required where assent of the utility petitioner has been obtained and other parties have not objected (id. at 3 n.1, 5). In its Appeal, Makowski explains that its untimely filing was prompted by the record peak demand experienced by NEPOOL on July 21, 1994 (id.).³ In addition, Makowski takes issue with the finding by the Hearing Officers that granting Makowski intervention in this case would risk undue delay or disruption in the orderly conduct of the proceeding (id. at 4). Makowski asserts that due to the confidential nature of settlement discussions, the Hearing Officers can best evaluate the effect of any-late filed petition by considering the comments or objections filed by the parties to the settlement discussions (id.). Therefore Makowski argues, the absence of any comment or objection supports the negative inference that their Petition would not affect the orderly

³ Makowski also states that complete information regarding this peak demand was unavailable to Makowski until the early part of August 1994 (id.).

conduct of this proceeding (id.). In support of Makowski's alternative position, that it be allowed to intervene in the adjudicatory phase of this case, Makowski argues that since the adjudicatory phase has not yet begun, Makowski's intervention would not have any affect on the orderly conduct of that phase of the proceeding (id. at 6).

III. STANDARD OF REVIEW

In conducting adjudicatory proceedings, the Department "may allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding, and allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose," as the Department may order. G.L. c. 30A, § 10(4); 220 C.M.R. § 1.03(1)(e). Pursuant to IRP Procedures, any person who wishes to intervene shall file a written request with the Department pursuant to 220 C.M.R. § 1.03; and such requests shall be filed within ten business days of the date of the IRP filing (Procedures at 4).^{4,5} The regulations also provide that where good cause appears,

⁴ Since the deadline for publication of the Order of Notice was June 20, 1994, the intervention deadline was set for July 5, 1994.

⁵ Procedural aspects of IRP cases are, in general, governed by 220 C.M.R. § 1.01 et seq. However, the Department may follow any procedural rule contained in the IRP Procedures that is not inconsistent with such regulations.

not contrary to statute, the presiding officer may permit deviation from these rules. 220 C.M.R. § 1.01(4). Further, a petition for leave to intervene in a Department proceeding must describe the manner in which the petitioner is substantially and specifically affected by the proceeding. 220 C.M.R. § 1.03(1)(b). In the case of a late-filed petition to intervene, a hearing officer may also consider whether granting such a petition would prejudice the existing parties or unduly delay or disrupt the Department's interests in the orderly conduct of its proceedings. Western Massachusetts Electric Company, D.P.U. 92-88, Procedural Order dated October 9, 1992.

Under G.L. c. 30A, § 10, the Department has broad, though not unlimited, discretion to grant or deny participation in its proceedings. Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45-46, cert. denied, 439 U.S. 921 (1978); Newton v. Department of Public Utilities, 339 Mass. 535, 543, n.1 (1959). In Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975), the Court expressed the rationale behind an agency's discretion over intervention and participation in its proceedings: "the multiplicity of parties and the increased participation by persons whose rights are at best obscure will, in the absence of exact requirements as to standing, seriously erode the efficacy of the administrative process." In short, the Court has recognized the Department's independent interest as an agency

charged with the efficacious discharge of the public's business -- an interest separate and apart from that of any party.

IV. ANALYSIS AND FINDINGS

Makowski's petition to intervene late was filed approximately two weeks before the three month settlement period was scheduled to end.⁶ We concur in the Hearing Officers' observation that Makowski offered no explanation why it was unable to file a timely petition. The untimeliness of the Makowski petition would have rendered it deficient, even had it been accompanied by a persuasive statement of how the petitioner was substantially and specifically affected by the proceeding. G.L. c. 30A, § 10(4); 220 C.M.R. § 1.03(1)(c). That deficiency was neither excused nor cured by the requisite showing of good cause. 220 C.M.R. § 1.01(4). Further, based on what was stated in Makowski's Petition, we agree with the Ruling that Makowski's intervention at such a late date would have risked undue delay or disruption in the orderly conduct of the proceeding.⁷

⁶ The IRP Procedures state that the Department may hold adjudicatory hearings and technical sessions as the public interest requires, beginning approximately three months after filing of the IRP to allow time for settlement negotiations to take place (IRP Procedures at 9-10). In this case, a Joint Motion for Approval of Offer of Settlement was filed with the Department on September 1, 1994.

⁷ We also concur with the analysis in the Ruling that, because of
(continued...)

However, in its Appeal, Makowski asserts that the Department has previously allowed late filed intervention when the petitioner did not assert specific and compelling reasons for untimely filing. Nonetheless, the regulations applicable to this case clearly state that the hearing officer may permit a late filed petition to intervene only where good cause has been shown. 220 C.M.R. §§ 1.01(4) and 1.03(1)(c). We note that even if parties do not object to a late-filed petition to intervene, this does not necessarily satisfy or waive the good cause requirement under the regulations. The silence or acquiescence of parties concerning petitions to intervene cannot negate the sound exercise of the Department's judgment. However, we acknowledge that in the past, when no objections were raised, the Department may have allowed late petitions to intervene that did not demonstrate good cause for untimely filing. In consideration of this, it would appear unjust to rigorously enforce what may have been a heretofore relaxed rule without adequate warning. See Boston Gas Company v. Department of Public Utilities, 405 Mass. 115, 120-121 (1989). Accordingly, in this instance, the Department will waive the defect of untimeliness of the

⁷(...continued)

the unexplained failure of Makowski to file a timely petition, there was no need for the Hearing Officers to address whether Makowski would be substantially and specifically affected by this proceeding.

Makowski petition. Therefore, the Makowski petition to intervene is allowed insofar as the post-settlement phase of this proceeding is concerned.

But, petitioners to intervene in future proceedings are put on notice that the defects of untimeliness (220 C.M.R. § 1.03(1)(c)),⁸ of failure to make a showing of specific and substantial effect (G.L. c. 30A, § 10(4); 220 C.M.R. § 1.03(1)(b)),⁹ and of failure to show good cause why untimeliness or some other defect is justified or should be excused (220 C.M.R. § 1.01(4)), will henceforth be enforced with stricter attention to statutory and regulatory requirements so that due process

⁸ Greater latitude in recognizing a public interest exception may be appropriate in the case of public officials who may represent a broad interest that may warrant special consideration (e.g., officials authorized to petition to intervene by appropriate municipal executives or boards of selectmen, members of the General Court, or the Attorney General). We need not develop the particulars here, beyond noting the general point. See, e.g., Town of Sudbury v. Department of Public Utilities, 351 Mass. 214, 218 (1966); Wilmington v. Department of Public Utilities, 340 Mass. 432, 438-439 (1960).

⁹ Although the statutory standard that a petitioner for intervention be specifically and substantially affected is not precisely defined, this legal requirement cannot be satisfied by conclusory repetition of the statute's language. To do so would risk reducing legal pleading to empty formality. To accept as satisfying the terms of G.L. c. 30A, § 10(4) a perfunctory statement of speculative effect would be to treat the Legislature's express precondition to intervene as nearly meaningless. This we may not permit. The statute should not be applied to strip it of meaning. Matter of Yankee Milk, 372 Mass. 353, 358 (1977); Bolster v. Commissioner of Corporations and Taxation, 319 Mass. 81, 84-85 (1946).

and administrative efficiency are better served. The increasing complexity and cost of litigation require that the Department -- consistent with the requirements of due process under G.L. c. 30A, the Administrative Procedure Act -- pay stricter attention to the efficient and expeditious management of its dockets.

As noted, Makowski also asserts that it was unable to file timely since its Petition was prompted by an event that did not occur until July 21, 1994, which was after the intervention deadline. We note that this argument was first raised on appeal of the Hearing Officers' Ruling. Whether it would have been a sufficient showing of good cause to waive compliance with the intervention deadline is something we need not decide here. The Department has before it only the question whether the Hearing Officers properly ruled on the specific petition of August 15, 1994. If there was an error, the error concerned their appealed disposition of that petition and not some augmented or corrected version. It was not appropriate for Makowski to rewrite or supplement its petition on appeal. Administrative efficiency requires that a party appealing a hearing officer's ruling on a petition to intervene not be routinely allowed to raise new arguments or factual allegations not presented below but rather injected for the first time on appeal. Administrative efficiency requires that a petitioner state his claim fully to the hearing officer and, if dissatisfied with the hearing

officer's ruling, appeal that ruling on the petition as presented below.

Further, it is necessary to address Makowski's claim that intervention approximately two weeks before the end of the three-month settlement period posed no risk of procedural disruption. We agree with the Ruling that Makowski's intervention at such a late date would have risked undue delay or disruption in the orderly conduct of the settlement proceeding. Makowski argues that the silence or lack of objection on the part of the negotiating parties proves that its late petition to intervene would pose no risk of disruption at this important phase of the case. This argument is specious. The most prudent assumption a hearing officer could reasonably make in such circumstances would be that injection of a new participant so late in complex settlement negotiations was far more likely than not to disrupt the dynamics at work among the parties and deflect the negotiations from their course. We note that one of the duties of a hearing officer is to conduct orderly proceedings; and, in IRP cases, these duties include ensuring that there is an opportunity for parties to hold meaningful settlement discussions without the risk that their efforts may be disrupted or negated by addition of new voices and issues to their deliberations. See 220 C.M.R. § 106(6).

For the reasons set forth here and in accordance with the Department's authority to grant intervention to a party in the whole or

any portion of the proceeding, we hereby allow Makowski to intervene in this proceeding should the Department not approve the settlement filed in this case.

V. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the appeal of J. Makowski Associates, Inc. from the Hearing Officers Ruling on motion to intervene late in all phases of this proceeding is hereby denied; and it is

FURTHER ORDERED: That the alternative request of J. Makowski Associates, Inc., to intervene should the Department not approve the settlement in this proceeding, is hereby granted.

By Order of the Department,

Kenneth Gordon, Chairman

Mary Clark Webster, Commissioner